Supreme Court, U.S.
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NO. 85-660

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 1, 1985
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NOTE:

The Opinion of the Colorado Supreme Court appealed from here, People v. Connelly, 702 P.2d 722, appears as Exhibit A to the Petition for Writ of Certiorari and is not reproduced here.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

DATE	PROCEEDINGS
8-31-83	Information filed in Denver District Court
9-1-83	Defendant remanded to Colorado State Hospital for competency examination
10-14-83	Court finds defendant incompetent to proceed
3-7-84	Defendant deemed restored to competency
5-25-84	Hearing on defendant's motion to suppress statements and order suppressing statements and derivative evidence
6-5-84	Notice of Interlocutory Appeal filed
	COLORADO SUPREME COURT
7-8-85	Decision reported by Colorado Supreme Court
7-9-85	Remittitur to trial court
7-19-85	Motion to withdraw remittitur denied

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Excerpts from Reporter's Transcript of Suppression Hearing in the Denver District Court on May 25, 1984.

Testimony of Officer Anderson [p.6, l.20 - p. 18, l.13]

DIRECT EXAMINATION BY MR. JOHNSON:

Q Sir, would you state your full name and spell your last name for the record?

A Patrick Robert Anderson,

A-n-d-e-r-s-o-n.

Q How are you employed?

A Police officer for the City and County of Denver.

Q How long have you been so employed?

A Since August of 1979.

Q Sir, I want to direct your attention back to August 18 of 1983; were you so employed and on duty on that date?

A I was so employed on that date, yes, sir.

Q Directing your attention to the morning hours of that date, were you on duty?

A I was off duty.

Q Were you in fact working?

A I was working in an off-duty capacity, yes, sir.

Q Where was that?

A That was in the 1600 Block of Court Place.

Q Was that within the City and County of Denver, State of Colorado on that date?

A Yes, sir, it was and it is.

Q Did anything unusual happen at that time or at that location?

A Yes, sir.

Q What was that?

A A party approached me while I was standing on the street and stated to me

that he had killed someone and wanted to tell me about it.

Q Now, at the time that this party approached you, how were you dressed?

A I was dressed in full police uniform.

Q Would that be the same type of uniform you have on today in court?

A Yes, sir, the same uniform.

Q Badge and nameplate and the works?

A The works, yes, sir.

Q Did you have your hat on?

A Yes, sir, I did.

Q At the time this party approached you and told you he wanted to tell you about a murder, what was your response?

A At first, I thought he was some sort of a crackpot, to be honest.

* * *

Q (By Mr. Johnson) Officer Anderson, you say you thought he was a crackpot; was he doing anything which made you think that?

A No, but a lot of people come up to police officers and tell them things that usually they are sometimes under the influence of drugs or alcohol or some type of thing like that.

* * *

Q And what occurred next?

A I noticed that his manner of dress and his demeanor didn't coincide with my feelings that he might be mentally unstable or anything like that or under the influence of alcohol or drugs, and ---

Q How do you mean, not coincide, sir?

A Well, he was upright, he was dressed clean, neat. His hair was combed, clean pants, clean jacket.

* * *

Q Based on his statement and your observations, did you take any action?

A Yes, sir, I did.

Q What did you do?

A I advised the party of his Miranda warnings.

Q What advisement is that?

A The advisement that he has a right to remain silent, that anything he says can and will be used against him in a court of law, that he has a right to an attorney and have him present during questioning, and if he cannot afford an attorney, one will be appointed for him before questioning.

Q Did you ask him if he understood those rights?

A Yes, I did.

Q Did he respond?

A Yes, sir, he said that he did.

Q After you had advised Mr. Connelly what did you do next?

A For my own safety, I conducted a cursory search for any weapons and placed the party in handcuffs.

* * *

Q (By Mr. Johnson) After you had called Detective Antuna, would you tell us what happened next between yourself and Mr. Connelly?

A As I was waiting for Detective Antuna to respond, I again advised Mr. Connelly that he did not have to talk to me, and I asked him if he had been drinking, and he stated, no, and he also stated no to the fact that I asked him if he had been using drugs, and he again, like I say, replied no. I asked him if he had ever been treated for any mental disorders, and he stated that he had been in several different hospitals. I believe in my statement I put in how many. I don't recall.

Q What was your purpose in asking him if he had ever been in any mental hospitals?

A Just to more make myself feel more like I -- that I wasn't dealing with anybody who was mentally unstable or anything like that.

Q Was there anything in the actions or words of Mr. Connelly that made you feel that he had in fact been in a mental institution?

A I just really can't elaborate. My own personal feeling is that he might have been, yes. I can't elaborate as to why.

* * *

Q During this time, while you were waiting for Detective Antuna, did you threaten Mr. Connelly or promise him anything or use any duress or do anything to elicit any statements from him?

A No, sir.

Q Other than questioning?

A Other than questioning, right.

* * *

CROSS-EXAMINATION BY MR. BERNAL:

* * *

Q In your statement, you indicated on page 1 of your statement that his speech was clear and unwavering [sic]?

A Yes, sir.

Q And yet on page 2 you indicate that you had asked him if he had been drinking or taking drugs, and he indicated no, and that you also asked him if he had received any treatment for any mental disorders, and he indicated yes?

A That's correct.

Q And isn't it also a fact on your statement you also indicated that he told you he had been treated in five different hospitals?

A I believe that's correct; yes.

* * *

Q After he indicated to you that he had been treated in five different mental

details regarding his treatment beyond that point, did you?

A I didn't ask him anything else about his treatment, no, sir.

* * *

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Excerpts from Reporter's Transcript of Suppression Hearing in the Denver District Court on May 25, 1984.

Testimony of Detective Antuna [p.23, l.16 - p.27, l.2]

DIRECT EXAMINATION BY MR. JOHNSON:

* * *

Q Now, at some point, did you have an opportunity to talk to Mr. Connelly?

A Yes, I did.

Q Would you relate how that occurred and what the substance of that conversation was, verbatim if you can do that, but if not, the substance?

A Okay, I could do it just the substance of the conversation. Once I talked to Officer Anderson and gathered the information that he had that was related to him by Mr. Connelly, I requested that

they take the handcuffs off Mr. Connelly. At that time, I placed Mr. Connelly in my police car, and both officers were off duty, so you know, I felt that they should probably get back to their jobs, so I let them go at that point and advised Mr. Connelly of his rights, verbally advised him of his Miranda rights in the police car, and basically just asked him, you know, to tell me what he had on his mind.

* * *

Q When you asked him to tell you what was on his mind, did he respond to you?

A Yes, he did.

Q What did he say?

A In essence, he told me that he had come back to Denver and that he had wanted to confess to a murder of a young Indian female.

* * *

Q When he told you this information, did that ring any bells in your mind about any current homicides in Denver?

A Not to me, no.

Q Did you have any further discussions with Mr. Connelly?

A Yes, I did.

Q What were the nature of those, please?

A Transported him down to Denver Police headquarters from the Court Street address, and there I contacted Sergeant Thomas Haney and informed him as to what Mr. Connelly had told me. Sergeant Haney was more familiar with the total group of homicides that we handle in Denver and began checking some records.

Q Was that check fruitful in turning up anything?

A Well, he had come up with a female, an unidentified female that her body was discovered I believe in April of 1983, and

we had no identification on her whatsoever, so along with Sergeant Haney and I, we sat down in Sergeant Haney's office and began to get some more information from Mr. Connelly.

Q Could you relate, please, the nature of the office? Was it a small office, large office? Did it have windows, that sort of thing?

A Yes. One whole wall is windows. The office size is probably 15 by 10 feet roughly. It's got a desk and chairs, and you know, just a business office is what it amounts to.

Q Were there any other persons in the room besides yourself, Mr. Connelly and Sergeant Haney?

A No, there was not.

Q Was the door open or closed, do you remember?

A I don't remember.

Q And what was the nature of the questioning? Did you ask questions, then Sergeant Haney, or how did that occur?

A I think I recall I just basically asked Mr. Connelly to tell Sergeant Haney what he told me in the car, and at that point, Mr. Connelly openly told Sergeant Haney the same thing.

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Excerpts from Reporter's Transcript of Suppression Hearing on May 25, 1984.

Testimony of Dr. Metzner

[p.46, l.21 - p.70, l.16]

MR. BERNAL: Your Honor, I would call Dr. Metzner to the stand.

THE COURT: Doctor, please step forward.

* * *

THE COURT: I will just take notice of the report dictated September 22, typed September 22, received by the Court October 14, and then the other matter was dated in a letter on Dr. Metzner's letterhead February 29, 1984.

MR. BERNAL: Those are the only two reports I will be addressing in my testimony through Dr. Metzner.

THE COURT: Mr. Johnson, do you have any objections to the doctor testifying as an

expert in the field of forensic psychiatry?

MR. JOHNSON: No, Your Honor.

THE COURT: The doctor will be received as an expert in the field of forensic psychiatry.

JEFFREY METZNER was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BERNAL:

* * *

Q Would you please look at the individual at the end of Defense Counsel table and state if you recognize that person.

A Yes, that's Mr. Connelly.

Q Were you called upon by this Court to do an evaluation of Mr. Connelly?

A Yes, I was.

* * *

Q (By Mr. Bernal) Briefly, the history of the confession ---

A The history of the confession, Mr. Connelly told me that during August 17, during the late afternoon, he began experiencing God's voice telling him to go to Denver and confess the alleged crime to a policeman, and he began acting on those thoughts, and by 6:00 or 8:00 p.m. he had taken, withdrawn some money from the bank and had taken a plane from Denver -- from Boston to Denver. He then described arriving in Denver, spending the night basically walking around town, looking for the scene of the alleged crime. He eventually located it, said he was able to locate it with the help of the voices that he was hearing, and that the following morning the voices told him to go check in in a hotel or motel, and he found a place near the airport. It was around this time that the voices began telling him that he should go confess, and he described being

extremely ambivalent about this, going from the hotel to the airport anywhere from three to five different times, with the intent of wanting to go back to Boston.

Finally, the voice, this voice he consistently described as being God's voice, telling him that he had to confess, that he really had two choices. He could either confess or he could kill himself, and he mentioned prior to this time he felt that he had some choice in whether to confess or not. Once the voice changed the content, he felt that he didn't have much of a choice. The voice told him to go get a razor blade to kill himself. He made it quite clear he did not want to kill himself, and the other option he saw was to confess, and that's when the voice told him to do a number of things at that time, such as send money back home to his

mother because he wasn't going to need that ---

Q Let me interrupt you there for a moment. You indicated prior when we had met prior to this hearing a concern about whether he was telling the truth as to the money that had been sent. Why did you have a concern about whether he in fact had sent the money?

A The reason I had that concern is a lot of my opinion is based in great part on what he told me, and so the reliability of what he's telling me has significant impact on what my opinion is, so if he told me that he sent some money and that later proved not to be true, then I at the very least have to reconsider how that fit into my assessment of him.

Q Then prior to preparing this report my office furnished you a copy of all discovery?

A That's correct.

Q Did you find anything in the discovery to indicate to you that Francis was telling the truth?

A Yes. In -- and I believe it's one of the police reports, I think one of the officers went to Boston to interview various people, and in one of those reports it indicates that either mother or sister did receive a little over $400 in the mail shortly after his arrival in Denver.

Q Was that the time that Detective Haynes was in Boston?

A I believe so.

Q And you are referring to $403 received in an envelope postmarked August 18?

A That's correct.

Q After you found out that the police had that information, what did that do to

affect Mr. Connelly's credibility in speaking with you?

A That would indicate to me that the reliability of the history was fairly good.

Q Okay, please continue then. You indicated -- I stopped you at the point of sending the $400 home.

A That God told him to do a number of things including sending the money home. He also wanted to send his key to his motorcycle home, and tells me that God told him he didn't have time to do that.

He then eventually made it to downtown Denver, and I think he took -- I think it was a bus, as I recall, and first policeman he came up to he made the confession, and some other pertinent comments. I talked with him, he then went into who God was and what he essentially said was God was really his father, and

referring to his deceased biological father, and that that then made him Jesus Christ, and then he went into a rather elaborate delusional system of what that meant to him.

Mr. Connelly was unable to describe what went on during his statements to the police, essentially reported to me that he felt confused about being asked a lot of questions but also being -- feeling quite upset once he eventually got to the scene of the alleged crime.

Q What is the exact problem that Francis has?

A Francis has a lot of problems, but I think the relevant problem is that Mr. Connelly suffers from a significant mental disorder that is called chronic schizophrenia. This is an illness which is characterized by various psychotic episodes. Let me speak some English.

Psychosis is a form of a mental disorder that's characterized frequently by significant personality disorganization, often bizarre behavior, withdrawn behavior, difficulty being in contact with reality, and also frequently is associated with auditory or visual hallucinations. That's what I mean by psychosis.

Schizophrenia is a chronic illness that often is manifested by psychoses. Mr. Connelly demonstrated to me the following symptoms of a schizophrenic disorder. He has experienced intermittently on a fairly chronic basis auditory hallucinations; that is, hearing voices that are not really there. He has also experienced less frequently visual hallucinations, that is, seeing things that aren't really there.

I think what's particularly important here is the type of auditory hallucinations he experienced. I think he has intermittently experienced what is called command hallucinations. What a command hallucination is, it's a type of hallucination in which the person experiencing it feels as if they have to act on whatever the voice is telling them. Most people with schizophrenia do not experience command hallucinations. From what Mr. Connelly described to me, that was pretty consistent in my mind with a command hallucination, and that really affects his volitional abilities; that is, his ability to make free and rational choices. I think that his illness did not significantly impair his cognitive abilities, and what I mean when I say that, it would be my belief for example that when he was read his Miranda rights,

he probably had the capacity to know that he was being read his Miranda rights, and he had certain rights, but whether that -- I think he wasn't able to use that information because of the command hallucinations that he had experienced.

Q My next question being, if you had an opinion as to whether he voluntarily spoke to the police --

A It's my -- and again, it's clearly dependent upon what your definition of voluntary is. I don't think that he was able to make a free and intelligent decision in making that statement based on impairment by his chronic schizophrenia.

Q Do you believe that at the time -- strike that.

How do you know that he was feeling those problems at the time that he made the confession? How do we know that he wasn't a lot worse when he spoke to you,

but when he talked to the police he was probably okay?

A Let me tell you how I went into my differential diagnosis. One possibility is that at the time of the confession, he was not psychotic, and that he was now lying to me and making this up. That's certainly one possibility, and that's what was inconsistent with that was, one, he was admitted to Ward 18 at Denver General Hospital on August 23d in a very psychotic state. It's still possible that he wasn't psychotic at the time, and this was in reaction to the legal situation that he was in. It's my opinion, though, that what he told me, I didn't have doubts. I didn't have significant doubts about the reliability of his history. That is a lot of people could have told me some of the things he said, but there's a certain flavor, a certain manner of telling you

that which based on mainly your clinical experience whether you believe him or not, plus I had some outside confirmation, and I haven't found anything in his history that he has told me that has been inaccurate, and sources that I have used to confirm his history include getting records from previous hospitalizations, as well as reviewing police reports, as well as the hospital staff, so the answer is it is certainly possible that he wasn't psychotic at the time of the confession; it's my opinion based on my examination, however, that he was psychotic.

Q He signed a waiver of rights; what affect in your opinion would that signature have coming from Francis Connelly in that he signed the waiver of rights?

A What affect would it have on what?

Q His perception at that time. Is there a relationship between the voluntariness in his mind and the signature that he had on the advisement?

A It's my opinion that Mr. Connelly felt that he didn't have a choice about making a confession. It was not just that his instructions from God and not just instructions, it was that his command from God was that, you go tell the police, and you tell them everything that happened, and you don't have a choice, and if you have to sign things, you sign things, but you have to tell them, and that's what he -- in my opinion is what he was acting on.

* * *

Q Doctor, you were present in court when you heard Detective Antuna and Officer Anderson talk about the mental state of Francis Connelly, and you also heard Detective Antuna agree that his belief is

that Francis Connelly was normal or appeared to be normal.

A Yes.

Q How is it that a lay eye cannot really pick up what really is wrong with an individual?

A Well, in general, psychoses can take a variety of forms. The common or lay perception of psychosis is when people that anyone after one minute of interaction will say that they are bonkers or crazy, and the vast majority of people who are psychotic, it's very obvious to anyone within a small period of time that's the case, and they're pretty disorganized. Now, psychoses can take other forms. For example, someone could have what's called a paranoid delusional belief such as that the CIA is following me, and if there's no basis to reality to that, that's a psychotic belief, and they

may be very functioning in all other aspects of their life, and if you never ask them questions that would elicit that information, you would think they were pretty normal.

I think in similar ways, what went on with Mr. Connelly is Mr. Connelly clearly was very organized in a number of different fashions. He was able to withdraw money from a bank, buy a ticket to come to Denver, find a policeman, give him all this information. That's pretty organized, and to most people it doesn't look like anything crazy about that. The question is, then, if you ask him, get into, why are you telling me this, and if you believe what he is saying, if you believe that he was experiencing auditory hallucinations, that's pretty psychotic.

Now, you're not going to know about that in general unless you specifically

ask that question, and if you don't ask the question and it's not particularly relevant, then you may not think there's anything particularly abnormal about the individual.

* * *

CROSS-EXAMINATION BY MR. JOHNSON:

Q Good afternoon, Dr. Metzner.

A Good afternoon.

Q Doctor, you said that Mr. Connelly was experiencing God's voice; is that the way he related to you as God's voice?

A That's correct.

Q Could that be called conscience?

A I don't think it -- I don't think that's what he predominantly was experiencing. I think it's if you want to look at it from a psychodynamic viewpoint, I think it's quite likely that he was feeling pretty guilty about what was happening, but -- and that may have been a

part of it, but I don't think the voices he was hearing was his conscience.

Q The voices themselves, but they could have been -- I have forgotten the term used in here, but generated from within as opposed to being external, perhaps by conscience?

A Before I completely answer your question, maybe it would be helpful if you can define again for me what you mean by conscience.

Q What I mean by conscience?

A Uh-huh.

Q I had a professor ask me once in philosophy class and I couldn't do it then. I'm really referring to the fact of -- and I'm not sure if it's in your report or the other doctor's, if I could have just a moment ---

A To help clarify, if what you are asking me was he feeling guilty and was that the

prime reason he made the confession, again, that's a possibility. My opinion is that that was not the prime reason that he made a confession. It was because he was psychotic at the time. Part of his psychosis, I'm sure, is related to him feeling guilty.

* * *

Q The command hallucinations that you talked about affect volitional ability, but not cognitive?

A In Mr. Connelly's case, it was my opinion that it affected his volitional ability.

Q And as far as his cognitive is concerned and based upon the historical data related to you and which was subsequently proved, would you say specifically Mr. Connelly has the ability to relate accurately those cognitive facts, historical data?

A Now?

Q At that time.

A I thought during both times, all four times I was talking to him that he could. The reason I found him incompetent during the first time was it seemed pretty clear at the time that he was coming in and out of psychoses, so I wasn't very confident that he could consistently relate accurate information. By my February exam, I felt confident enough that he was now able to do it consistently.

Q And at the time of the statement on August 18, he could have been at that time as well?

A Yes.

Q As to the volitional end of it, he was being ordered to kill himself, is that right, by the voices in the alternative?

A Yes.

Q He did not choose to kill himself?

A That's correct.

Q He then perhaps could have not chosen to sign the advisement as well?

A He certainly could have chosen not to, and again, you have to weigh the areas of stress and how that affects his decision, but yeah, he could have chosen not to.

Q It was your opinion that he did not choose?

A It was my opinion that he really didn't have much of a choice.

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Ruling of the Denver District Court on May 25, 1985. [Reporter's Transcript pp.83-91]

JUDGE'S RULING

THE COURT: The Court finds as facts in this case that the Defendant on August 18 of 1983 contacted Officer Anderson of the Denver Police Department in the 1600 Block of Court Place and advised him that he had killed someone and wanted to talk about it to the police. Officer Anderson was in uniform at the time. The officer accurately advised the Defendant of his Miranda rights, asked if he understood those rights; the Defendant stated yes. Defendant was searched and cuffed, and the Defendant further stated that he had killed a girl in approximately November of 1982 in the general vicinity of West

Mississippi, that they were traveling companions.

The Detective called Detective Antuna, and the detective went to the scene, placed the Defendant in his vehicle, uncuffed him and released the police officers.

During the time Officer Anderson was speaking to the Defendant, the officer noted that the Defendant was neatly dressed and groomed, that he had clear and unwaivering speech, and there was nothing in his manner which he could state for us or define for us that gave him the impression the Defendant was not acting as a sane and rational person except that he did have a feeling, a feeling that he cannot define, that the Defendant was not acting normally. Officer Anderson used no threats, force, coercion or tricks to get

the information that was given to him by the Defendant.

Detective Antuna continued conversing with the Defendant. He was verbally advised of his rights, no promises or inducements were made to him, no threats were used, and the Defendant indicated that he had come back to Denver from Boston, or that he had come to Denver from Boston with a young Indian girl named Mary Ann Junta. The Defendant was taken to headquarters, records were checked, found that an unidentified female had been killed. The Detective along with the sergeant in the Homicide Detail asked the Defendant further questions, and he responded openly toward both of the officers.

The Defendant was asked if he would take the officers to the location of the homicide, and he agreed to do this. They

went to the scene. The Defendant found the location. As he got to the location, he got out of the car, walked directly to the rear of a building, became visible [sic] upset, stated that he was frightened, he walked into the storage room and indicated that this was where the homicide had taken place. No suggestions were made by the officers, no directions were given by the officers to find the place. They just followed merely the instructions given to them by the Defendant.

Detective Antuna testified that he didn't think that the Defendant had any kind of mental problems, that he was perfectly sane, and still feels based on his contact with the Defendant that he was sane. He admits that he has no specific training in the area, but the officer obviously comes in contact with a great

number of people in his job who are somewhat less than sane. I'm sure, at the time the officer meets them, but in his experience even he did not feel that the Defendant was ill in any manner. The Defendant answered questions appropriately. He was oriented at least as to place, and there was nothing in the contact of the -- or the conduct of the police officers involved that in any way would be considered by the Court to be overbearing or coercive.

The Court also finds that in the early morning hours of August 19 of 1983, the Defendant had become very disoriented. He had been in custody all this time. He talked with his Public Defenders and their investigator. He was not answering questions appropriately. He began at that point then discussing how voices had told him to come to Denver and that he followed

the directions of these voices and that he ultimately confessed.

Dr. Metzner was asked by the state hospital after the Court had sent the Defendant to the hospital for evaluation to evaluate the Defendant. The doctor's reports are in the court file. The Court will incorporate those into the facts here.

The ultimate decision of the doctor is that the Defendant was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17 of 1983 when he was told in his mind by God to go to Denver and to tell the police everything about this. The Defendant withdrew money from the bank, secured a plane ticket to Denver, came to Denver, was compelled by the voice of God to seek out and find the location of the homicide and then he went to a hotel to rest.

God's voice became stronger in the sense that the Defendant was given alternatives because he wanted to go back and did in fact go back to the airport on a number of occasions so that he could go back to Boston, but when he did that, he was told that he had only two choices, one of which was not to go back to Boston, the only two being he had to either kill himself or to confess. In exercising his options, the Defendant chose to confess to the police, sought out Officer Anderson as he did and ultimately confessed.

Prior to confessing, he sent his last money home to his mom as he had been directed by God in his mind.

From this, the Court concludes legally that there was nothing untoward in what the police did in receiving and recording the Defendant's comments to them. The burden is upon the Prosecution

first by a preponderance to prove that the statement made -- statements made to the police were made voluntarily. The Court does not need to decide whether or not legally the Defendant was insane at the time of the statements being made, only must find whether or not the Prosecution has proved by a preponderance of the evidence that he was voluntarily giving those statements.

The Court has reviewed the Fish case cited in the brief, also the Raffaelli case. Prior to the hearing, I looked at the Thorpe case and the Pinada case, all mentioned in the District Attorney's brief. I did not look at the Columbe [sic] and Townsend US Supreme Court cases cited in the brief, and I was aware of but I did not look at the Bookman case. The District Attorney makes two arguments to show that in fact by a preponderance of

the evidence that the statements made were voluntary. First of all, by analogy, the District Attorney argues that this statement is basically like the hearsay exception to the Rules of Evidence, and that is that, golly, this is a truthful statement, it was accurate and for that reason it should be admitted, but primarily the argument is made that this is a product of the Defendant's mind, a cognitive choice between the two options he had, the matter is basically accurate, so therefore, the confession should be admitted.

In conjunction with this, they argue that the State -- there was no State action to punish by suppression. The Court is not really suppressing matters here, though. The Townsend case and the Columbe [sic] case cited at page 4 of the brief are very accurate statements and

very old statements of law. These are made in 1961 and 1962. The essence of the admission of the confession is based upon in the Court's estimation and by these cases the fact that there is an element of self-direction in the giving of the statements. I believe this is an overflow of the basic Judeo-Christian ethic of self-determination and free will.

The Townsend language quoted for the Court in the District Attorney's brief is very definitive in this regard. "If an individual's will was overborne or if his confession was not the product of his of a rational intellect and a free will, his confession is inadmissible because coerced." There's no element there, and there's none in the Columbe [sic] quote that's cited which indicates that there has to be something done by the police in order to make the confession involuntary.

Here, in the Court's estimation, there's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both of which were mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did, and he did so in a manner which is not unusual for people who suffer schizophrenia. He was able to do so so that trained, experienced police officers were not able to discern the mental difficulty that the Defendant was having.

The Court feels that with the overwhelming evidence presented by the Defense, that if I must balance this by a

preponderance of the evidence that the Prosecution just cannot meet that burden and did not meet that burden under these circumstances. In judging all of the circumstances then, as required by the Fish and Thorpe cases, the Court feels that the People have not met their burden by a preponderance of the evidence to show that the statement was voluntary.

In addition, the People would have to show if we even would get that far by a standard of clear and convincing evidence that the Defendant waived his right to counsel and his right to self-incrimination, and the Court cannot find by that standard being even a more difficult standard for the Prosecution that he did waive his right to counsel and his right to self-incrimination voluntarily, knowingly and intelligently; rather, he would sign anything, he would

do anything to follow the mandate of God to confess because his only alternative was to kill himself, and he did not choose to do that, both alternatives, however, being a figment of his imagination and a very definite product of his psychosis.

The Court feels, therefore, that the confession and all statements made to the police and all directions given by the Defendant in finding and locating the scene of the crime must be -- may not be presented as evidence, not necessarily that they are suppressed, merely under the language of the Columbe [sic] case this confession or its admissibility would offend due process, and therefore, the Court will not permit the District Attorney to present any evidence concerning the Defendant's statements to the police after he contacted them on August 18 of 1983.

MR. JOHNSON: Your Honor, the People understand the Court's ruling. At this point, we would ask for one point of clarification. What is the Court's ruling as to derivative use, things derived from the statement by the police department? Would any of those be admissible?

THE COURT: But for the Defendant's statements to the police, the police could not have developed any other, and had not developed any evidence linking the Defendant to the crime. I don't know, but I would guess that the police have more evidence at hand than Paragraphs 1, 2, 3 and 4 of the Defendant's motion to suppress would indicate. I'm sure there was more physical evidence and things like that, maybe not, but anything obtained prior to August 18 would certainly be admissible. Anything subsequent to August 18 the Court would feel would be directly

related to the Defendant's statements to the police and then therefore must under the fruit of the poisonous tree doctrine be excluded also.

SUPREME COURT OF THE UNITED STATES

COLORADO v. FRANCIS BARRY CONNELLY

On Petition For Writ Of Certiorari To The Supreme Court of Colorado

No.85-660. Decided January 13, 1986

The motion of Duane Woodard, Attorney General of Colorado, et al., for leave to file a brief as amici curiae is granted. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. In addition to the question presented by the petition for writ of certiorari, the parties are requested to brief and argue the following question:

Did respondent's mental condition render his waiver of Miranda rights ineffective?

The application for stay, presented to JUSTICE WHITE and by him referred to the

Court, is granted pending the issuance of the mandate of this Court.

MEMORANDUM OF JUSTICE BRENNAN, with whom JUSTICE STEVENS joins.

This grant of certiorari is yet another instance supporting the concern that the Court shows an unseemly eagerness to act as "the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction...." Wainwright v. Witt, ___U.S.___, ___(1985)(BRENNAN, J., dissenting). Most often, this concern has been evoked by the Court's overly narrow interpretations of the Constitution's fundamental guarantees and the laws established to secure relief from violations of those guarantees. See id.; United States v. Leon, ___U.S.___, ___(1984)(BRENNAN, J., dissenting). However, the Court's willingness to take

special judicial action to assist the prosecutor has not been limited to its interpretations of substantive law. For example, in New Jersey v. T.L.O., ___U.S.___(1984), reargument was directed on a constitutional question not raised by either party because it provided a broader basis for upholding the State's action. Similarly, two Terms ago, JUSTICE STEVENS noted the "quite striking" fact that during the preceding two-and-a-half years the Court had summarily reversed, without briefing or oral argument, 19 criminal cases -- every one on the petition of the warden or the prosecutor and every one in his favor. Florida v. Myers, ___U.S.___, ___ _ ___, and n. 3 (1984)(STEVENS J., dissenting). Nothing has changed in the year-and-a-half since that decision, for, although in the immediate wake of JUSTICE STEVENS' dissent the Court did summarily

reverse a few convictions on the petition of a criminal defendant, the trend to grant summary dispositions only in favor of the prosecutor has resumed and the record now stands at 26-4.[1] No

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[1]The four cases since Florida v. Myers decided in favor of a criminal defendant are: Payne v. Virginia, ___U.S.___(1984)(per curiam); Thompson v. Louisiana, ___U.S.___(1984)(per curiam); Smith v. Illinois, ___U.S.___(1984)(per curiam); and Lanier v. South Carolina, ___U.S.___(1985)(per curiam). The seven cases decided in favor of the warden or prosecutor during that same period are: Massachusetts v. Upton, ___U.S.___(1984)(per curiam); Florida v. Rodriguez, ___U.S.___(1984)(per curiam); United States v. Woodward, ___U.S.___(1984)(per curiam); United States v. Gagnon, ___U.S.___(1985)(per curiam); United States v. Benchimol, ___U.S.___(1985)(per curiam); Delaware v. Fensterer, ___U.S.___(1985)(per curiam); and Pennsylvania v. Goldhammer, ___U.S.___(1985)(per curiam). Payne, Thompson, and Smith followed closely after JUSTICE STEVENS' dissent in Florida v. Myers. Since Smith was decided on December 10, 1984, however, five of the last six summary dispositions have been in favor of the State.

(Footnote Continued)

particularly informed understanding of statistics is required to appreciate that the likelihood of courts so consistently erring in favor of defendants is truly remote and that only a one-sided exercise of discretion can explain these results.

The Court's treatment of this case provides another clear example of why there is concern that the Court engages in injudicious efforts to assist prosecutors. Today, the Court takes the unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him

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(Footnote Continued)
I am not suggesting that all the summary judgments awarded to the State were incorrect or improper, although I did not agree with the result in many of the cases. It is the Court's selective employment of its summary disposition power only in favor of the State that is most disturbing.

to seek reversal on a ground he did not present himself.[2]

Respondent approached a uniformed police officer and stated that "he had killed someone" and wanted to tell the officer about it. Before questioning respondent about the killing, the officer informed respondent of his Miranda rights. Respondent waived his rights and proceeded to confess to the murder of a young girl. After being charged with murder, respondent moved to suppress his statements as made involuntarily. A psychiatrist testified that respondent believed that the voice of God had

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[2]This action is even less justifiable than the improper decision to order reargument in New Jersey v. T.L.O., supra, since here the Court cannot even point to having heard oral argument as justification for revising the issues presented to suit its own desires.

commanded him to confess or commit suicide. The psychiatrist testified that respondent was suffering from "chronic paranoid schizophrenia" and "command auditory hallucinations" when he confessed and that respondent's actions were not the product of a free will. The trial court suppressed statements made both before and after the Miranda warnings were given on the ground that respondent's mental state rendered these confessions involuntary and tainted his waiver of the Miranda rights. The Colorado Supreme Court affirmed, and this petition followed. The prosecutor carefully limited his petition to this Court to challenge only the suppression of respondent's initial, unsolicited statements. The petition expressly states that "[respondent's] later confession, which involves a Miranda issue, is not an issue in this petition." Pet. for Cert.

15. Despite this, the Court directs the parties to brief and argue that issue.

We do not know why the prosecutor chose not to seek review of the Miranda issue. But, whatever the reason, review was not sought, and it is hardly for this Court to "second chair" the prosecutor to alter his strategy or guard him from mistakes. Under our Rule 21.1(a), "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Given petitioner's express disclaimer that the Miranda issue is presented, that question obviously is not "fairly included" in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be

granted a criminal defendant, however strong his claim. In asking the parties to address issues that the State chose not to present in the petition for certiorari, the Court goes beyond a mere philosophic inclination to facilitate criminal prosecution: the Court gives the appearance of being not merely the champion, but actually an arm of the prosecution.[3]

I realize that, in itself, this order is not a matter of great significance. But even matters of small effect can cloak issues of great moment. In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers

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[3]I express no views about the merits of the issues on which certiorari is now granted. See Ohio ex rel. Eaton v. Price, 360 U.S. 246(195()(statement of BRENNAN,J.).

recognized that limitless state power afflicts the innocent as well as the guilty, that even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen -- guilty or innocent -- is treated fairly and accorded dignity and respect by the State. Of course, the Framers could not foresee the shape our society would take as the nation developed. Nor could they foresee how the police function would evolve to keep pace. Rather, it has fallen to this Court -- the "ultimate interpreter of the Constitution," Baker v. Carr, 369 U.S. 186, 211 (1962) -- to enforce the rights enshrined in the Bill of Rights and preserve the principles established in 1789. Ours is the duty to prevent encroachment on these principles by

over-zealous police in the discharge of their great responsibility to prevent crime. Every law-abiding citizen shares with the Court the belief that the prevention of crime is an essential governmental function. However, the members of this Court have the special responsibility to recognize that, as essential as is the goal of preventing crime, "the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor." Florida v. Myers, ___U.S., at ___(STEVENS, J., dissenting). This Court has, sadly, lost sight of this role, to the detriment of the rights of each of us. I can only repeat: "One can only hope that this day too will soon pass." Wainwright v. Witt, ___U.S., at ___ (BRENNAN,J., dissenting).